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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

SAMMY JOHN,

Defendant and Appellant.

2d Crim. No. B202230
(Super. Ct. No. GA065877-01)
(Los Angeles County)

Sammy John appeals a judgment following conviction of first degree residential burglary, theft from an elder person, and possession of methamphetamine, with findings of prior serious felony convictions and service of a prior prison term. (Pen. Code, §§ 459, 368, subd. (d), 667, subd. (a)(1) & subds. (b)-(i), 1170.12, subds. (a)-(d), 667.5, subd. (b); Health & Saf. Code, § 11377, subd. (a).)¹ We modify the judgment to stay sentence on count 2, theft from an elder person, and to strike one of the three five-year enhancements imposed pursuant to section 667, subdivision (a)(1). We otherwise affirm.

FACTS AND PROCEDURAL HISTORY

On May 23, 2006, 88-year-old Earl Leith sat in a wheelchair outside his San Gabriel home and spoke with his neighbor. John drove by, stopped, and spoke with Leith. John claimed to have repaired the roof of Leith's home previously, and offered to check its

¹ All further statutory references are to the Penal Code unless stated otherwise.

waterproofing under the guarantee. John stated that his work crews were repairing roofs in the neighborhood. Leith, John, and J., a child accompanying John, went inside the home.

John walked throughout the house and secretly sprinkled water on clothing in a bedroom closet. He then informed Leith that the roof was leaking and that he would repair it for \$3,500 cash. He did not provide Leith with a business card or company name. Leith agreed to pay for the repairs.

John then drove Leith to a nearby bank. J. accompanied Leith inside the bank and Leith withdrew \$3,500. Leith gave the money to John, who then drove him home. When he left the vehicle, Leith memorized some of its license plate numbers.

John did not repair the roof, nor did he return to Leith's home. Leith reported the incident to police officers and provided the license plate numbers. Several days following the incident, John attempted to purchase a vehicle from Leith's neighbor by presenting the neighbor with a bank envelope containing cash.

Police officers investigated and learned that the license plate numbers matched a vehicle owned by John. On June 1, 2006, police officers detained him during a traffic stop, and found methamphetamine within the vehicle. Leith and the caregiver of the neighbor identified John in a photographic lineup.

The jury convicted John of first degree residential burglary, theft from an elder person, and possession of methamphetamine. (§§ 459, 368, subd. (d); Health & Saf. Code, § 11377, subd. (a).) Separately, the trial court found that John suffered three prior serious felony convictions, alleged for sentence enhancement and recidivist sentencing, and that he served a prior prison term. (§§ 667, subd. (a)(1) & subds. (b)-(i), 1170.12, subds. (a)-(d), 667.5, subd. (b).) The court then struck two prior serious felony convictions pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. It sentenced John to a prison term of 30 years 4 months, consisting of a doubled upper-term of 12 years for the burglary conviction (count 1), three 5-year terms for suffering prior serious felony convictions, and subordinate consecutive terms of 2 years and 16 months, respectively, for theft from an elder person (count 2) and possession of methamphetamine (count 3). The

court imposed restitution, restitution fines, and other fees, and awarded John 502 days of presentence custody credit. (§§ 1202.4, subd. (b), 1202.45, 1465.8, subd. (a)(1).)

John appeals and contends that 1) his punishment for count 2, theft from an elder person, violates section 654, and 2) the trial court erred by imposing two section 667, subdivision (a) enhancements for criminal convictions that had been jointly filed and prosecuted.

DISCUSSION

I.

John argues that section 654 precludes punishment for count 2, theft from an elder person, because the burglary was the means of committing the theft from Leith. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1211 [section 654 precludes multiple punishment for criminal acts committed with single intent and objective].) He asserts that the trial court erred by not staying sentence on count 2. The Attorney General concedes that there is no evidence that John harbored more than one criminal intent and objective.

The criminal convictions for burglary and theft from an elder person arose from an indivisible course of conduct. (*People v. Cline* (1998) 60 Cal.App.4th 1327, 1336 [court may not punish defendant for commercial burglary and grand theft where he entered department store to steal clothing].) "Burglary consists of entry into a house . . . with the intent to commit a felony. . . . Thus, ordinarily, if the defendant commits both burglary and the underlying intended felony, Penal Code section 654 will permit punishment for one or the other but not for both." (*People v. Centers* (1999) 73 Cal.App.4th 84, 98.) Here the evidence establishes that John entered Leith's home with the intent to steal his money. The two-year consecutive term for theft from an elder person must be stayed. (*People v. Hester* (2000) 22 Cal.4th 290, 294.)

II.

John contends that the trial court erred by imposing two five-year prison terms for the two burglary convictions he suffered in 1992 in Case No. BA048173. He points out that the two burglary convictions were not "brought and tried separately" as required by section 667, subdivision (a)(1). (*People v. Wiley* (1995) 9 Cal.4th 580, 585

[section 667, subdivision (a)(1) enhancement applies to charges brought and tried separately; proceedings must have been formally distinct from filing through adjudication].) The Attorney General concedes that the trial court erred and that one term must be struck.

III.

The Attorney General requests that we remand the matter for resentencing because the trial court's statement at sentencing is unclear whether it intended to strike allegations of one prior conviction or two prior convictions pursuant to *People v. Superior Court (Romero)*, *supra*, 13 Cal.4th 497. The trial court sentenced John as a second strike offender, however.

We reject the Attorney General's position because the record sufficiently reflects the trial court's intention to strike two, not one, of the three prior strike allegations. Moreover, John's sentence would have been the same whether he suffered three prior strikes or two prior strikes. Thus, striking only one prior strike conviction would have been pointless.

We modify the judgment to stay the two-year sentence on count 2, and to strike one of the three five-year enhancements imposed pursuant to section 667, subdivision (a)(1), for a modified aggregate term of 23 years 4 months. We direct the trial court to prepare an amended abstract of judgment and forward it to the Department of Corrections. The judgment is otherwise affirmed.

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GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

Mildred Escobedo, Judge
Superior Court County of Los Angeles

Valerie G. Wass, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Lance E. Winters, Supervising Deputy Attorney General, Steven E. Mercer, Deputy Attorney General, for Plaintiff and Respondent.